

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY

DEPUTY

KAZENERCOM TOO AND YERKIN
BEKTAYEV,

PLAINTIFFS,

V.

WORLD TRADE FINANCIAL CORP.
AND PENSON FINANCIAL SERVICES,
INC.,

DEFENDANTS.

CAUSE NO. A-11-CA-831-LY

ORDER ON REPORT AND RECOMMENDATION

Before the court are Defendant World Trade Financial Corporation's Motion to Dismiss Complaint or, in the Alternative, For A More Definite Statement filed October 19, 2011 (Doc. #13); Defendant Penson Financial Services, Inc.'s Motion to Dismiss filed October 21, 2011 (Doc. #15); Defendant World Trade Financial Corporation's Corrected Memorandum in Support of Motion to Dismiss Complaint or, in the Alternative, For A More Definite Statement filed October 26, 2011 (Doc. #23); Plaintiffs' Response to Defendant Penson Financial Services, Inc.'s Motion to Dismiss filed November 17, 2011 (Doc. #28); Plaintiffs' Response to Defendant World Trade Financial Corporation's Motion to Dismiss filed November 17, 2011 (Doc. #29); Defendant World Trade Financial Corporation's Reply in Support of Motion to Dismiss Complaint or, in the Alternative, For A More Definite Statement filed November 28, 2011 (Doc. #31); Defendant Penson's Reply in Support of its Motion to Dismiss filed November 30, 2011 (Doc. #32); Defendant Penson Financial Services, Inc.'s Motion to Disregard the Declarations of George Lambert and Henry R. Ferguson in Response to Penson's Motion to Dismiss filed December 1, 2011 (Doc. #34); and Plaintiffs'

Response to Defendant Penson Financial Services, Inc.'s Motion to Disregard the Declarations of George Lambert and Henry R. Ferguson in Response to Penson's Motion to Dismiss filed December 15, 2011 (Doc. #35). The motions, responses, and replies were referred to the United States Magistrate Judge for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended.

The Magistrate Judge filed a Report and Recommendation on March 12, 2012 (Doc. #38), recommending that the court grant Defendant World Trade Financial Corporation's motion to dismiss, grant Defendant Penson Financial Services, Inc.'s motion to dismiss, and dismiss Defendant Penson Financial Services, Inc.'s motion to disregard Plaintiffs' declarations. Plaintiffs' Objection to the Report and Recommendation of the United States Magistrate Judge was filed March 26, 2012 (Doc. #39). Defendant World Trade Financial Corporation filed its Opposition to Plaintiffs' Objection to Magistrate's Report on April 2, 2012 (Doc. #40). Defendant Penson's Response to Plaintiffs' Objection to Report and Recommendation was filed April 12, 2012 (Doc. #43). Plaintiffs' Reply to Defendant World Trade Financial Corporation's Opposition to Plaintiffs' Objection to Magistrate's Report was filed April 12, 2012 (Doc. #44). Plaintiffs filed their Reply to Defendant Penson Financial Service, Inc.'s Response to Plaintiffs' Objection to Magistrate's Report on April 19, 2012.

Plaintiffs also filed on June 18, 2012, a Motion for Leave to Take Notice of a Pleading Filed by Defendant World Trade Financial Corporation (Doc. #48). Defendant World Trade Financial Corporation filed its Opposition to Plaintiffs' Motion to Take Judicial Notice of Pleading on June 18, 2012 (Doc. #49). Defendant Pension Financial Services, Inc. filed its Response on June 28, 2012

(Doc. #52). Plaintiffs' filed their Reply on July 9, 2012 (Doc. #53). In light of Plaintiffs' objection to the Magistrate Judge's Report and Recommendation, the court has undertaken a *de novo* review of the entire case file in this action and finds that the Report and Recommendation is correct and should be approved and accepted by the court.

Plaintiffs assert that dismissal based on limitations is inappropriate through a motion to dismiss because additional discovery on the factual disputes in the case warrant further discovery. Plaintiffs further assert that it was improper for the Magistrate Judge to conclude on the basis of the pleadings that Plaintiffs knew or should have known of their claims and that Defendants would be involved the transaction at issue, relying on the Fifth Circuit's opinion in *Frame v. City of Arlington*, 657 F.3d 215, 240 (5th Cir. 2011).

As noted by the Magistrate Judge in his Report and Recommendation, numerous courts, including the United States Supreme Court and Fifth Circuit have addressed and upheld the defense of limitations raised in a motion to dismiss.¹ Further, Plaintiffs' reliance on *Frame* is misplaced because that case considered the issue of tolling limitations under federal law, not Texas law. Whether an injury is "inherently undiscoverable and objectively verifiable" such that the discovery rule for limitations applies at all under Texas law is a question of law for the court to decide. *TIG Insurance Co. v. Aon Re, Inc.*, 521 F.3d 351, 355 (5th Cir. 2008); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W. 3d 562, 567 (Tex. 2001); *Moreno v. Sterling Drug, Inc.*, 787 S.W. 2d 348, 351 (Tex. 1990). Having reviewed the Report and Recommendation, the pleadings, and the supporting documentation, the court finds that the Magistrate Judge applied the proper standard under Texas law and appropriately found Plaintiffs' claims time barred by the statute of limitations.

¹ See Footnote 1 of Report and Recommendation of Magistrate Judge (Doc. #38), at 6.

With regard to Plaintiffs' motion for leave to take notice, the court finds that it should be denied for the reasons stated substantially in Defendants' responses to the motion. The pleading Plaintiffs' seek for the court to consider is a brief filed in an unrelated cause in the United States Court of Appeals for the Ninth Circuit that has no bearing on the applicable statutes of limitations at issue in Defendants' motions to dismiss.

IT IS THEREFORE ORDERED that Plaintiffs' Objection to the Report and Recommendation of the United States Magistrate Judge filed March 26, 2012 (Doc. #39) is **OVERRULED**.

IT IS FURTHER ORDERED that the United States Magistrate Judge's Report and Recommendation (Doc. #38) filed in this cause is **APPROVED** and **ACCEPTED**.

IT IS FURTHER ORDERED that Defendant World Trade Financial Corporation's Motion to Dismiss Complaint filed October 19, 2011 (Doc. #13) is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Penson Financial Services, Inc.'s Motion to Dismiss filed October 21, 2011 (Doc. #15) is **GRANTED**.

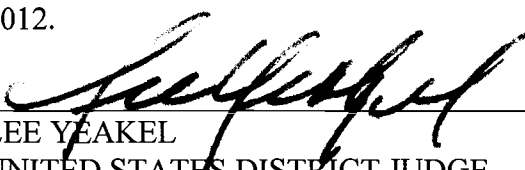
IT IS FURTHER ORDERED that Defendant Penson Financial Services, Inc.'s Motion to Disregard the Declarations of George Lambert and Henry R. Ferguson in Response to Penson's Motion to Dismiss filed December 1, 2011 (Doc. #34) is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiffs' complaint is **DISMISSED WITH PREJUDICE**.

IT IS FINALLY ORDERED that Plaintiffs' Motion for Leave to Take Notice of a Pleading Filed by Defendant World Trade Financial Corporation filed June 18, 2012 (Doc. #48) is **DENIED**.

A final judgment shall be filed subsequently.

SIGNED this 10th day of August, 2012.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE